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NO .....

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

DOROTHY JEAN RAY,
PETITIONER

V.

S. DAVID FREEMAN, RICHARD M. FREEMAN, ROBERT N. CLEMENT,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI— FEDERAL EMPLOYMENT SEX DISCRIMINATION AND REPRISAL

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

DOROTHY JEAN RAY

Petitioner

v.

S. DAVID FREEMAN, RICHARD M. FREEMAN, ROBERT N. CLEMENT,

Respondents

PETITION FOR CERTIORARI—
FEDERAL EMPLOYMENT
SEX DISCRIMINATION
AND REPRISAL

OPINIONS BELOW

The decision of the Board of Appeals and Review of the United States Civil Service Commission, issued on December 16, 1975; the unreported final order, findings of fact and conclusions of law of the district court on Sept. 13, 1978; and the unreported opinion of the 5th Circuit on Sept. 25, 1980: and denial of a petition for rehearing entered on Oct. 22, 1980 are included in the appendix.

JURISDICTION

Petitioner seeks review of the opinion of the 5th Circuit made and entered on Sept. 25, 1980. The denial of a petition for rehearing by the 5th Circuit made and entered on Oct. 22, 1980 occurred exactly 90 days prior to the date this petition was filed with the Clerk of the Supreme Court of the United States (excluding Inauguration Day). A copy of the order denying the petition for rehearing

is included in the appendix.

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and 28 U.S.C. §1651.

QUESTIONS PRESENTED FOR REVIEW

(1) Should issues that establish a prima facie case in a class action employment discrimination case have the same weight when presented to show pretext in an individual federal agency complaint?

(2) Should discrimination incidents in the nature of reprisal that occurred subsequent to the filing of the agency complaint have been considered by the District Court?

(3) Were incidents of failure to consider petitioner for employment as a chemist or technician from a "pool of applicants" that occurred after filing her agency complaint "like or related" to those that established her prima facie case?

(4) Was the good faith affirmation that a male was properly accorded a veterans' preference in hiring sufficient to overcome petitioner's prima facie sex discrimination case?

PARTIES

Respondents named in the caption on the case are the chairman, S.David Freeman, and the other members of the Board of Directors of the Tennessee Valley Authority.

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

The federal statutes involved are 42 U.S.C. §2000e-16, 42 U.S.C. §2000e-5(f) through (k), 42 U.S.C. §2000e-3(a), 5 U.S.C. 3313; Tennessee Valley Authority Personnel Manual, Section 4 - Cooperative Student Program; Tennessee Valley Authority Equal Employment Opportunity 1973 Annual Report; TVA CODE, Office of the General Manager, III SELECTION; and PERSONNEL MANUAL INSTRUCTION, PROMOTION AND TRANSFER, Salary

Policy PM Sect. 7, and APPOINTMENTSSalary Policy PM Section 7.

STATEMENT

This sex discrimination and reprisal action under the Equal Employment Opportunity Act of 1972 arose out of the Tennessee Valley Authority's (TVA's) failure to consider petitioner's application for employment as a chemist during the time June, 1973 through February 1976 when she was finally employed by TVA.

The basic facts are largely in dispute due to the fact that the district court in a partial summary judgment limited all evidence relevant to both employment discrimination under 42 U.S.C. §2000e-16 and reprisal for having participated in her husband's discrimination claim against TVA and for having filed her own claim under 42 U.S.C. §2000e-3(a) to the time period between the filing of her employment application June 19, 1973 and the time of filing

her amended complaint with TVA's EEO office on February 20, 1974.

The district court limited discovery and consideration of evidence to issues bearing on specific intent to discriminate in hiring with respect to 4 positions without regard to factors showing disparate impact which petitioner introduced to show pretext, or alternatively to establish a prima facie case of disparate impact.

Petitioner, Dorothy Jean Ray, is a female who received the first B.S. degree in chemistry that was ever awarded by the Georgia Institute of Technology. The cooperative student program on which respondents relied to justify their hirings was not available to chemistry majors at the Georgia Institute of Technology. Petitioner worked part time and summers for two-and-one-half years as a chemistry undergraduate research assistant in college. After graduation in 1965, she was

employed as a chemist with the Rocketdyne Division of North American Aviation from January, 1966 to January, 1967. She was awarded a full membership in the American Chemical Society in recognition of that experience and of her scholarly publications, thus establishing her full professional standing as a chemist. She left her employment with Rocketdyne in the Los Angeles, California area at a time when her husband, Dr. James D. Ray, was hired as a chemist by TVA in Muscle Shoals, Alabama. Due to TVA's nepotism policy, employment was not available to her at TVA (Trial Transcript, p. 25), until after her husband's so-called "reduction-in-force" on March 31, 1973. On February 17, 1976, she finally was hired by TVA as an SE-3 chemical laboratory analyst.

Class-Related Claims That Were Given No Weight As Showing Pretext By The District Court

(1) "The Inexorable Zero." The Dec. 16, 1975 decision of the Civil Service

Commission's Board of Appeals and Review is in the Appendix. At p. A16 it contains a finding of discrimination:

> The Board has considered the complainant's remarks concerning the low number of women in technical areas of the agency. However, even though the statistics furnished by the complainant show this to be true, the board does not find after its review of the evidence of record pertinent to the allegations in the complaint that the complainant was discriminated against because of her sex.

The district court found (See Appendix, p. A22):

> Agreed Fact 7. That at the time Dorothy Jean Ray's application was submitted on June 19, 1973, there were no females employed as professional chemists by TVA in its Fundamental Research Branch of the Division of Chemicalopment.

At the Civil Service Commission hearing on March 6, 1975, (CSC transcript, pp 190-1), Mr. Ernest O. Huffman, Director of the Division of Chemical Development, of which the Fundamental Research Branch is a part, was unable to identify a single professional woman chemist in the entire Division which had about 120 professional and tech-

nician employees. This was also his testimony at the trial (Trial Transcript, pp 228-9).

The 5th Circuit (Appendix, p.A37)noted that in 1971-1972 and 1972-1973, 18% of those graduating with Bachelor of Science Degrees in chemistry from the accredited colleges and universities were female.

(2) All-Male-Subjective Criteria.

The district court found to be true:

> Agreed Facts 14. That in the Fundamental Research Branch of the Division of Chemical Development of TVA, the Branch chief makes the decision as to which individual to hire for a job vacancy.

No objective guidelines for hiring were presented at the trial.

Petitioner's position stated in the pretrial order is undisputed:

> All jobs at TVA for which plaintiff and other females are qualified are filled by selection based on subjective evaluation by a single supervisor who has absolute discretion and responsibility for his choice. Said supervisors are with a single exception, all male.

(3) Past History of Discrimination.

A past history of discrimination at TVA was uncontested at the trial (Trial transcript, pp 102-106) and characterized by the district court as "virtually worthless" testimony (ibid. p. 103). Even after the EEO Act of 1972 was effective, the uncontested testimony at the trial (Trial transcript, p. 107) shows TVA's deliberate indifference to the requirements of Title VII after it became law:

> Q. Now, directing your attention to late 1972, what if anything did Mr. Huffman have to say in your presence concerning the application of Title VII to TVA?
> A. He stated at the meeting of the personnel of the branch, the professional personnel of the branch, that this would have no effect on us.

(4) Comparative Evidence of Qualifications Lacking.

The district court did not find any fact regarding the individual qualifications of any of the three co-op student graduates who were hired on August 6, 1973 (Plaintiff's Suggested Additional Facts,

10), but only the generality:

> Defendants Suggested Additional Facts. 31. That a 1973 graduate with a B.S. degree in the chemistry field who had been currently employed in the field would reasonably seem more likely to have an awareness of current developments and knowledge in the field than a graduate with a B.S. degree in the field who had received that degree seven years earlier, and who had not been employed in the chemistry field since January 1967.

Nowhere does the record show that any inference that any one of these co-op student graduates was better qualified than was plaintiff for the vacant chemist positions.

(5) Alternative Selection Device Giving Equally Trustworthy Workmanship With Less Discriminatory Impact.

Petitioner showed that ohre was another selection device that would have resulted in equally trustworthy workmanship and less discriminatory impact. Thus, as noted by the 5th Circuit (Appendix, p.A-36):

> She was hired at the SE-level on February 17, 1976 and promoted to the SD-level in August 1977.

She is currently still employed by TVA, ad has been promoted to a position as SD-3 Research Chemist.

In contrast to the consideration given the employment applications of the co-op students, petitioner's application for employment was not even considered.

(6) Preference To Present Employees In Historically Discriminatory Agency.

As the 5th Circuit noted (Appendix, p. A40), the hiring practice at TVA gave preference to persons who were already in TVA's workforce, but the 5th Circuit did not comment on the history of sex discrimination in employment of chemists (supra).

(7) Generic Job Title In Pool-of-Applicants System Held Insufficient.

The district court and the 5th Circuit held that petitioner was required to state

her employment application was for specific jobs rather than simply all jobs for which the generic title "chemist" would indicate that plaintiff was qualified for. In so limiting petitioner's complaint, all of the SE-level (technician) jobs which she was qualified for during the period June 19, 1973 through Feb. 10, 1974 and which were filled (Trial transcript, p. 62). were excluded from evidence.

Mrs. Machtolff's (who classified petitioner's employment application) testimony (Trial transcript, p. 207) showed that "word-of-mouth" knowledge was involved in being able to state more than just the generic title "chemist" on TVA's employment application form:

> Q. Normally somebody from the outside wouldn't have any idea that those little bits of terminology exist: is that correct?
> A. Well, it would depend on their contact with other T.V.A. employees perhaps.

It was not contested that petitioner

had no knowledge that chemists at TVA start at the SE-level (Trial transcript. p. 26). It was undisputed that 40% of the SD-level chemists at TVA start at the SE-level (Trial transcript, p. 66).

(8) TVA's Affirmative Action Plan Ignored By CSC and Courts.

TVA's total failure to carry out their affirmative action plan (Appendix, pp which required that some preference be given to the solicitation of female chemist applications for employment was ignored by the district court and by the 5th Circuit. In contrast, the district court and the 5th Circuit both favored the mere "preference" that was accorded the male applicants that was based on another TVA regulation (Appendix, pp. A-56-7) which allowed such preference for co-op student graduates.

(9) Present Lack Of Discrimination Held To Prove No Past Discrimination.

At p. 3 of the District Court's Findings of Fact and Conclusions of Law, the statement:

> That (TVA's cooperative student) program was available to males and females alike and almost 50% of the participants are female, ...(emphasis supplied)

was completely changed by the 5th Circuit to the past tense:

> n. 4. ...Approximately 50% of the co-op participants were female. (emphasis supplied)

The record is devoid of any evidence to show that any female had ever actually benefitted from the "preference in hiring" under the "co-op" program.

POST-FEB. 20, 1974 CLAIMS

The Civil Service Commission"s Board of Appeals and Review (Appendix, A-16) held:

> ...since the complainant has a right to file a discrimination complaint concerning the positions the agency filled after her formal complaint and contact with the Counselor, the Board will limit its present review to the allegations made and the positions the agency filled up to the time of the complainant's formal complaint.

This holding was upheld in the district court, and affirmed by the 5th Circuit.

The regulation of the CSC (Appendix, p.A-58) required reprisal complaints that arose in the course of the administrative processing of petitioner's complaint to be accepted by the hearing examiner at the time of the hearing. That hearing was held on March 6, 1975. However, the allegations of reprisal involving systematic practices and denial of consideration for employment between Feb. 20, 1973 and March 6, 1975 were not considered by the CSC or the lower courts.

THE JOHN D. ATCHLEY JOB

The only reason given by the district court for finding the hiring of John D. Atchley to be non-discriminatory (Appendix, p. A-26) was:

> ...one (SE class) position became available and it was filled by John D. Atchley, a former employee and an applicant which TVA accorded pre-

> ference as a veteran over the non-veteran plaintiff. Mr. Painter, who prior to his retirement from TVA spent many years in handling personnel matters and who was formerly Area Personnel Supervisor, testified that Atchley was properly accorded that preference. In a post-trial brief, counsel for plaintiff argues that TVA failed to introduce evidence sufficient to show the particularities of his veteran perference status. Mr. Painter's testimony amply does this in the absence of any effort by plaintiff to show otherwise.

The 5th Circuit opinion is devoid of any mention of this sole reason given by the district court, and instead reached its own finding of ultimate fact (assuming a purely disparate treatment incident):

> When the TVA hired the male for an SE-level chemist's job in the Ammonia Branch, they needed an employee who could immediately fill the position. The male hired met their needs for he had previously performed that job and his capabilities were well known. Assuming that Ray established a prima facie case, the TVA more than adequately rebutted it by proving that its decision was based on the superior qualifications of the person selected.

The Administrative Record is devoid of any mention of a veterans' preference of Atchley.

EXISTENCE OF JURISDICTION BELOW

The District Court for the Northern District of Alabama had jurisdiction over these federal employment sex discrimination and reprisal claims under 42 U.S.C. §2000e5(f)(1)-(3), 2000e-16(c), 2000e-3(a).

ARGUMENT

The opinion of the 5th Circuit is anchored on the interpretation of Brown v. GSA, given in the 5th Circuit opinion in Hoffman v. Boeing (Appendix, p. A-42). However, Hoffman v. Boeing involved a federal employee who never sought pre-complaint counseling or timely filed a formal complaint, and gave as its authority Beale v. Blount, 461 F.2d 1133, 1140 (5th Cir. 1972), a 42 U.S.C. §1983 action in which it was held:

> ...Furthermore, this circuit allows the district court to consider only those grounds of complaint that were raised in the administrative process.

and which, in turn, gave as its authority

Unemployment Compensation Commission of Territory of Alaska v. Aragan, 1946, 329 U.S. 143, 155, 67 S.Ct. 245, 251, 91 L.Ed. 136 and Picard v. Connor, 1971, 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438 which only involved review of the administrative record.

Both Hoffman and Brown are distinguished from petitioner's case in that she did file a formal complaint with TVA's EEO office, and did seek "pre-complaint counseling."

The Supreme Court appears not to have ruled on the scope of evidence that may be presented in a trial de novo under 42 U.S.C. §2000e-16. That the 5th Circuit considers such an action to be in a category that is little more than a "live" reinactment of the administrative proceeding may be seen by comparison with the scope of evidence allowed to show pretext in non-federal employment cases such as Hazelwood School Dist. v. United States 97 S.Ct. 2736 and

Davis v. Califano 613 F.2d 957 (D.C. Cir. 1979) (also a federal employment discrimination case) which held:

> We... now explicitly hold, that statistical evidence may establish a prima facie case of employment discrimination in an individual case. (emphasis supplied)

The conflict of Davis with the 5th Circuit opinion in the instant case is evident in that petitioner established TVA's employment statistics of women as stark (1) supra, as in Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) or Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110.

Hazelwood indicated that all-male supervisor hiring authority based on subjective criteria, (2) supra, and (4) supra, and a past history of discrimination, (3) supra, and a preference in hiring for "Applicants with student or substitute teaching experience at Hazelwood..." ((analogous to (6) supra.) are indicative of

an environment of discrimination.

City of Los Angeles v. Manhart taught that "(Title VII) makes it unlawful to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin. 42 U.S.C §2000e-2(a)(1)." (emphasis in Manhart). Petitioner urges that when her claims are viewed not only under §2000e-2(a)(1), but also §2000e-(a)(2), (or both, a question that this court has not yet addressed), then as discussed under (f) supra, the district court's evaluation of her qualifications on the basis of its belief that on the average, persons with chemistry degrees that were obtained 6½ years ago would reasonably seem less likely to have an awareness of current developments did not show that any actual determination of her individual qualifications was made.

The district court's approval of a requirement for more than a generic job title,(6) supra, on petitioner's employment application does not appear to meet the standards used for beginning jobs in the pool-of-applicants standard of Albemarle Paper Company v. Moody, 95 S.Ct. 2362, 2375 (1975).

Petitioner has satisfied the requirement of Griggs v. Duke Power Co. 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971):

> ... if an employer does then meet the burden of proving that its tests are "job related," it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable (sex) effect, would also serve the employer's ligitimate interest in "efficient and trustworthy workmanship. " Id., at 801, 93 S.Ct. at 1823. Such a showing would be evidence that the employer was using its tests merely as a "pretext" for discrimination. Id., at 804-805, 93 S.Ct. at 1825-1826.

for which see (5) supra.

The district court and the 5th Circuit ignored TVA's failure to implement its

affirmative action plan by considering petitioner's employment application and thus failed to follow this court's Accardi doctrine, United States v. ex rel. Accardi, v. Shaughnessy 74 S.Ct. 499 (1954). See also: Violations by Agencies of Their Own Regulations, 87 Harv. Law Rev. 629 (1974).

Item (9) supra "50% of the participants are female," which was corrupted to "50% were" by the 5th Circuit is error as was recognized in Causey v. Ford Motor Company 516 F.2d 416, n.7 (5th Cir. 1975):

> ...(W)hatever the nature of present hiring practices, they neither explain nor justify, without more, the past failure to hire minority ... (job applicants.)

Atchley Job

The bare statement that Atchley had a veterans' preference is an affirmative defense. The district court improperly placed the burden of proof on petitioner.

Post Feb. 20, 1974 Jobs

The administrative record and the trial

transcript are replete with testimony on positions that were filled without consideration of petitioner following the filing of her administrative complaint. Such evidence should have been allowed to show reprisal by the Civil Service Commission's own regulation (Appendix, p. A-58).

Petitioner reads United Air Lines, Inc. v. Evans 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977) as allowing such claims when, as here, she has presented evidence of systematic practices having a disparate impact on professional chemist female applicants for employment at TVA, and where there has been no evidence presented (and proffered evidence excluded) that these practices have been eliminated. Petitioner's prima facie case based on statistics plus a McDonnell Douglas showing is not based on a discrete act, and should warrant consideration of her complaint as a

continuing one. To more narrowly circumscribe the Constitutional proscription against a bill of attainder seems too harsh.

Alternatively, non-consideration of petitioner for jobs after Feb. 20, 1974 should be viewed as showing:

> defendants persisted in the conduct after its (discriminatory) implications had became known to them. United States v. Jacksonville Terminal Company, 451 F.2d 418, 443 (5th Cir. 1971)

See also the deliberate indifference standard in Estelle v. Gamble 97 S.Ct. 285, 291 (1976).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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UNITED STATES CIVIL SERVICE COMMISSION
APPEALS REVIEW BOARD
Washington, D. C. 20415

D E C I S I O N

IN THE MATTER OF

)	
)	TYPE CASE:
)	
)	Discrimination: Sex
Dorothy J. Ray)	

BEFORE: Rool, McDonald and Jeffries, Board Members.

INTRODUCTION

Mrs. Ray (hereinafter referred to as the complainant) appealed to the Appeals Review Board from the April 14, 1975 decision of the Director of Equal Employment Opportunity, Tennessee Valley Authority, that the evidence of record did not support a finding that the agency discriminated against complainant because of her sex (female).

STATEMENT OF THE CASE

On January 4, 1974, the complainant contacted an Equal Employment Opportunity Counselor and complained that she had been

discriminated against when she applied for employment at Tennessee Valley Authority, Muscle Shoals, Alabama, on June 19, 1973, and her application was not processed until July 24, 1973. She also alleged that since she had a B.S. degree in chemistry she felt she met the qualifications necessary for employment and questioned why her application was not submitted and considered along with others for a position in Fundamental Research as a Analystical Chemist at the SD-3 level. On January 7, 1974, a meeting was held between the complainant and the Area Personnel Representative where the complainant was informed that based on her qualifications and education as stated in her application she did not meet the requirements for the Analytical Chemist, SD-3. As a result of this meeting, a notation was added to complainant's application that she was also interested in subprofessional positions as well as pro-

fessional positions. The Counselor was unable to resolve the complaint satisfactorily and complainant filed a formal complaint of discrimination on February 5, 1974, which was revised on February 20, 1974.

In her complaint, the complainant alleged that the agency failed to consider or circulate her application for employment. She also alleged that she was overlooked when three SD-1 chemists from Florence State College were hired; that the improper handling of her application for employment was influenced by the fact that her husband had filed a prior equal employment opportunity complaint with the agency, and that the agency hired men instead of women chemists.

An investigation of the complaint was conducted from March 11, 1974 through April 10, 1974, and from June 24, 1974 through July 12, 1974. By letter dated December 10, 1974, the Director of Personnel, Tenn-

essee Valley Authority, notified complainant of his proposed disposition of the complaint. The Director found that after the informal meeting with complainant and her husband and the findings of the Investigator, there was no evidence to support a finding that complainant had been discriminated against. The Director further informed complainant that her application was processed and certified for openings for which she was qualified without intentional or actual discrimination because of sex. Complainant was further informed that if she was dissatisfied with the proposed disposition she could request a decision, with or without a hearing by the Director of EEO, within 15 calendar days from receipt of the notice.

The complainant requested a hearing which was held by a Complaints Examiner on March 6, 1975. In his report to the agency, the Complaints Examiner found that the ag-

ency's processing of complainant's application was based on valid agency procedures and not discrimination because of sex or reprisal because the complainant's husband had previously filed a discrimination complaint against the agency. The Examiner recommended a decision that the preponderance of the evidence failed to support the complainant's allegation of discrimination based on sex and reprisal.

AGENCY DECISION

In its decision dated April 14, 1975, the agency concurred in the recommended findings of the Complaints Examiner and found that the evidence of record did not substantiate complainant's allegation of discrimination because of sex and reprisal. It is complainant's appeal from that decision which is currently before the Board for review.

REPRESENTATIONS TO THE BOARD

On appeal to the Board, complainant alleges that the Complaints Examiner erred when he stated at the hearing that her application for employment did not indicate sex or race and that this error and bias by the Examiner are basic to his finding of no discrimination. The complainant also cites specific areas in the case record in contradiction to the analysis and opinion of the Complaints Examiner, which will be discussed in detail in the analysis and findings of the Board's decision. The complainant further alleges that the evidence of record shows that the agency mishandled her application for employment and failed to follow its procedures; that she was discriminated against because of her sex; and that the agency's acts of reprisal against her resulted from her husband's prior complaint of discrimination against the agency.

ANALYSIS AND FINDINGS

The issue before the Board is whether the agency discriminated against the complainant because of her sex in its handling of her employment application and its failure to consider her for positions that became vacant in the agency, and whether the agency's actions in complainant's case were in reprisal for her husband having previously filed a complaint of discrimination against the agency.

With regard to complainant's allegation that the Complaints Examiner erred when he stated at the hearing that her application for employment did not indicate sex or race, the Board notes in its review of the complainant's application that it does indicate the complainant's sex. The Board does not find after its review of the hearing transcript that the Examiner showed bias or prejudice toward the com-

plainant and recognizes that the Examiner's findings may not be what the complainant desired. However, the mere fact that she may be dissatisfied with the evidence and what it revealed does not establish that it was biased.

The complainant alleges on appeal, as she alleged in her complaint, that the delay of 35 days in the processing and classifying of her application for employment was discriminatory. On appeal to the Board, the complainant alleges that the exact week her application was submitted the average time to classify applications was 4 days and that a male BS chemist and graduate of the University of North Alabama was quickly coded. The record shows that in testimony furnished at the hearing by Mr. Sidney Painter (hearing transcript p. 97), that the 35 day delay concerning complainant's application was not unusual since it was filed during a busy time and

vacation period when his chief clerk was on leave. He further explained that there were different people applying for different types of work and different procedures were used. The difference in processing time depended on the type of work the person applied for and the person that might have classified the application. He also testified (hearing transcript p. 100) that if a request came in for a candidate, it was office policy to go through the unprocessed applications to see if the applicant would be qualified to be considered for the vacancy. He further testified that the complainant's application was not submitted for any vacancy during the period June 19, 1973 through July 24, 1973, because there were no suitable openings or requisitions. The Board has reviewed the Personnel History Records (Exhibit 15 Appendix E) of the investigation report

which shows applications received and classified from May 23, 1973 to November 11, 1974, and finds that the length of time in classifying complainant's application was unusually long. However, in view of the evidence of record that it was the agency's policy to consider unclassified applications as well as those classified for a vacancy, and that no vacancies occurred for which the complainant was qualified for during the period June 19, 1973 through July 24, 1973, the dates complainant's application was submitted and classified, the Board does not find that the delay in classifying complainant's application was based on discrimination because of her sex.

In review of the complainant's allegations on appeal, the Board notes that a portion of those allegations deal with the denial of consideration for positions at the agency after her formal complaint of February 5, 1974, which was revised on Feb-

ruary 20, 1974. The Board notes that the Civil Service regualtions provide in section 713.214 that a discrimination complaint generally may be accepted for processing under the regulations only if the complainant brought to the attention of the Equal Employment Opportunity Counselor that matter causing her to believe that she had been discriminated against within thirty calendar days of the date of that matter or, if a personnel action, within thirty calendar days of its effective date. The Board further notes that since the complainant has a right to file a discrimination complaint concerning the positions the agency filled after her formal complaint and contact with the Counselor, the Board will limit its present review to the allegations made and the positions the agency filled up to the time of the complainant's formal complaint.

The complainant also alleges that

after her meeting on January 10, 1974, with Mr. Painter, he assured her that she would be considered for subprofessional as well as professional positions at the agency in line with her experience and training. She also calls the Board's attention to page 7 in the Complaints Examiner's findings where he stated, "... her application was submitted for every subprofessional job for which she was qualified", which complainant alleges is not true based on the subprofessional positions filled at the agency from January 10, 1974 to December 31, 1974, and June 19, 1973 to December 31, 1974. The Board notes in its review of the Complaints Examiner's findings, that the Examiner's remarks dealt with the period of June 1973 to February 1974, where he found that six requisitions for professional and subprofessional jobs were made by different divisions of the agency and that the vacancies were filled

by priority consideration to graduate co-op students, a male reinstated eligible, and a female Analytical Chemist, SD-3 (professional). The record shows that in accordance with the agency's agreement with North Alabama University, priority consideration was given to the graduate co-op students of that University. Accordingly, the record shows that three male co-op students were hired; a female co-op student was offered a job but declined; a male reinstatement eligible was hired; and a female Analytical Chemist SD-3 was hired. The record further reveals that the female Analytical Chemist was hired because she possessed the three years experience, which the complainant did not possess. In view of the above, the Board finds no error in the Complaints Examiner's statement and that the complainant was considered for professional and subprofessional positions during the period of June 1973 to February

1974 which were filled by priority consideration candidates and a female chemist who met the qualifications for a position of Analytical Chemist, SD-3. The Board finds no substantive evidence that the agency discriminated against the complainant because of her sex or as an act of reprisal concerning the above selections.

The complainant also alleges that male co-op graduates are given priority in hiring due to their experience with the agency, which is discriminatory on the basis of sex. The evidence of record reveals that the agency had entered into an agreement with North Alabama University to establish a co-op program in which the students were selected by the University and spent certain periods of time at the school and at the agency installation and were classified as temporary employees to escape the ceiling set on the hiring of permanent employees. Since the record

shows nothing improper with regard to this agreement and that the students selected for the co-op program were both male and female, the Board does not find evidence of discrimination based on sex.

With regard to the complainant's allegation that her consideration for employment was adversely affected by reprisal for her husband's prior discrimination complaint, evidence of record shows that the discrimination complaint of the complainant's husband was based on his reduction in force from the agency. The evidence of record also shows that agency officials were aware of the complaint which was not unusual since those officials were connected with personnel functions at the agency. However, in view of the evidence of record which shows that complainant was considered for positions at the agency and the positions were filled by the best applicant or through priority consideration, the Board

does not find that the reprisal charge is substantiated by the evidence of record.

The Board has considered the complainant's remarks concerning the low number of women in technical areas of the agency. However, even though the statistics furnished by the complainant show this to be true, the Board does not find after its review of the evidence of record pertinent to the allegations in the complaint that complainant was discriminated against because of her sex.

After a careful review of the complainant's allegations on the evidence of record, the Board finds that during the period the complainant filed her application for a position with the agency, the agency filled its positions with college co-op graduates who were given priority consideration, preference eligibles, and persons who met the qualifications for the position. The Board finds no substantive

evidence in the record that the complainant was not given full consideration for positions that she qualified for that became vacant, or that her nonselection resulted from discrimination because of her sex or reprisal for her husband having previously filed a discrimination complaint against the agency.

DECISION

The Appeals Review Board hereby affirms the decision issued by the agency in this case on April 14, 1975.

Civil Service Commission regulations provide that the Board's decision is final and that there is no further right of administrative appeal. However, if the complainant is not satisfied with this decision, she is authorized by section 717(c) of the Civil Rights Act of 1964, as amended on March 4, 1972, to file a civil action in an appropriate U.S. District court within 30 (30) calendar days of her rec-

eipt of this decision.

For the Board:

Herman D. Staiman
Chairman

December 16, 1975

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHWESTERN DIVISION

DOROTHY JEAN RAY,)
PLAINTIFF,)
)
VS.)
S. DAVID FREEMAN,)
DEFENDANT,)

Filed in Clerk's Office Northern District of Alabama
Sep 13 1978
James E. Vandegrift
United States District Court
CA 76-H-73-NW

FINAL JUDGMENT

In accordance with the Findings of Fact and Conclusions of Law this day entered, it is

ORDERED, ADJUDGED and DECREED that plaintiff have and recover nothing from defendant. Costs are taxed against plaintiff.

DONE this 13th day of September, 1978.

James H. Hancock
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHWESTERN DIVISION

DOROTHY JEAN RAY,	CA 76-H-73-NW
PLAINTIFF,	Filed In Clerk's Office Northern District of Alabama
VS.	
S. DAVID FREEMAN,	Sept 13 1978
DEFENDANT,	James E. Vandegrift, Clerk United States District Court by: Leigh R. Campbell

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This action was tried de novo before the count, without a jury, on September 6, 1978, and the court hereby enters its findings of fact and conclusions of law. At the commencement of the trial the court orally granted plaintiff's September 5, 1978 motion for clarification of its June 19, 1978 order granting summary judgment in defendant's favor as to certain matters by directing that such order does not foreclose plaintiff's claim for unlawful discrimination by defendant subsequent to

July 24 1973 through alleged reprisals against her for her husband's pursuing a review of his employment termination by Tennessee Valley Authority (TVA). Thus the issues presented to the court for determination in this Title VII action are (a) whether TVA at any time between June 19, 1973 and February 20, 1974 discriminated against plaintiff by reason of her sex with regard to her efforts to secure employment with TVA, and (b) whether at any time between July 24, 1973 and February 20, 1974, with regard to plaintiff's efforts to secure employment, TVA discriminated against her by reason of her assistance in her husband's pursuit of a review of his employment termination by TVA or by reason of her opposition to his discharge for alleged religious reasons.

As stated in open court on September 6, 1978, the court finds as established (a) each of the facts set forth in para-

graph 6(a) "Agreed Summary" of the March 23, 1977 pretrial order except (I) the first three words of the last sentence thereof are changed to read "Later she was" and (II) there is added thereto a sentence to read "Effective August 29, 1977, plaintiff was transferred and promoted to an SD-1 chemist position in the Fundamental Research Branch, Division of Chemical Development, TVA," and (b) each of the facts set forth in paragraph 1 through 24 under the heading "Agreed Facts" in the joint document filed October 7, 1977.

In addition to the foregoing, the court finds a s established each of the facts set forth in the following numbered paragraphs under the heading "Plaintiff's Suggested Additional Facts" in the joint document filed October 7, 1977: Paragraphs 1 (the court notes, however, that certain handwritten nota tions thereon were not on

the application when filed but were added by Janet J. Machtolff on July 24, 1973 and by Sidney Painter on January 10, 1974); 2; 6; 10; 13 (substituting the words "in number of" for the words "from one to over one hundred"); 14; 17; 18; 20; 21; 23; 24 (substituting the words "prior to December of 1973" for the words "during this period"); 26 (adding thereto the phrase "which graduates had participated in a long-existing cooperative student program"); 33; 34; 35 (adding the words "must have" immediately before the word "evaluated"); and 37. The court also finds as established each of the facts set forth in the following numbered paragraphs under the heading "Defendant's Suggested Additional Facts" in the joint document filed October 7, 1977: Paragraphs 1; 2; 3; 4; 5; 6; 7; 8; 9; 11 (eliminating the last sentence thereof); 12; 13; 14; 15; 16; 17; 19; 20; 21; 22; 23; 24; 25; 26; 27; 28; 30; 31; 32; 33; 34; 35; 36; 43; and 44.

As the foregoing factual findings indicate, the Muscle Shoals Area Employment Office was receiving several hundred job applications each month during the summer of 1973. When plaintiff filed her application on June 19, 1973, she did not request an interview or assistance in preparing the application. She had earlier filled it out and simply went by and filed it. Only two persons (Machtolff and Painter) in the employment office classified applications, and Ms. Machtolff properly classified plaintiff's application on July 24, 1973. Neither the limited classification "1520 Chemist Jr. Grad" nor the delay in classification in any way related to plaintiff's sex or to her husband's claim. Thus, until January 10, 1974, TVA appropriately viewed plaintiff's application as seeking only a professional position in the SD class. Possessing less than three years' work experience,

plaintiff would qualify only for an SD-1 or SD-2 chemist position. Three of these positions became available in early August of 1973but were filled by existing participants in TVA's cooperative student program. That program is and was administered as a logitimate, nondiscriminatory program designed to give preference in the selection of SD-1 and SD-2 chemists to students attending certain participating colleges while employed by TVA for specified periods of time. That program was available to males and females alike and almost 50% of the participants are female, but plaintiff was not a co-op student and consequently was not entitled to the business related preference accorded co-op students Goutner, Lawrence and Stumpe in early August of 1973. The failure of TVA to consider plaintiff for the three positions or to award her one of those positions was in no

way related to her sex or her husband's claim. Indeed, it is possible to conclude that these positions would not have even been available but for the fact that TVA felt some obligation to offer such a position to students who successfully completed the student co-op program and sought permanent employment. And except for those three positions, no other professional position for which plaintiff was qualified became available during the entire period June 19, 1973 to February 20, 1974.

With regard to subprofessional positions, as earlier noted, TVA properly viewed plaintiff as seeking an "SE" class job only as of January 10, 1974. Between that date and February 20, 1974, only one such position became available and it was filled by John D. Atchley, a former employee and an applicant which TVA accorded preference as a veteran over the non-veteran plaintiff.

Mr. Painter, who prior to his retirement from TVA spent many years in handling personnel matters and who was formerly Area Personnel Supervisor, testified that Atchley was properly accorded that preference. In a post-trial brief, counsel for plaintiff argues that TVA failed to introduce evidence sufficient to show the particularities of his veteran preference status. Mr. Painter's testimony amply does this in the absence of any effort by plaintiff to show otherwise. While plaintiff's name was not among the six persons submitted for consideration for the position, there is no evidence from which this court can conclude that such failure was in any way related to plaintiff's sex or to her husband's claim. TVA legitimately awarded the SE-4 job to John Atchley on February 19, 1974, and in doing so did not unlawfully discriminate against plaintiff.

In summary, the court concludes from

all the evidence herein, including the record developed during proceedings before the United States Civil Service Commission, (a) that at no time between June 19, 1973 and February 20, 1974 did TVA discriminate against plaintiff by reason of her sex with regard to her efforts to secure employment with TVA, (b) that at no time between July 24, 1973 and February 20, 1974 did TVA discriminate against plaintiff by reason of her assistance in her husband's pursuit of a review of his employment termination by TVA or by reason of her opposition to his discharge for alleged religious reasons, (c) that plaintiff has failed to show that she is entitled to any relief under 42 U.S.C. §§2000e, et seq., and (d) that defendant is entitled to a judgment in his favor on all remaining issues in this action. An appropriate final Judgment will be entered.

DONE this 13th day of September, 1978.

James H. Hancock UNITED STATES DISTRICT JUDGE

Dorothy Joan RAY, Plaintiff-Appellant,

v/

S. David FREEMAN, Aubrey J. Wagner and William L. Jenkins,

Defendants-Appellees.

No. 78-3746.

United States Court of Appeals,

Fifth Circuit.

Sept. 25, 1980.

Plaintiff brought suit against employer alleging discrimination in the refusal to hire her. The United States District Court for the Northern District of Alabama, James Hughes Hancock, J., entered judgment in favor of employer, and plaintiff appealed. The Court of Appeals, Politz, Circuit Judge, held that even assuming that plaintiff, who had been out of school since 1965 and out of work force for over six and one-half years, met initial burden of establishing prima facie case of employment discrimination in refusal to hire her for chem-

ist position, employer, which gave preference to participants in nondiscriminatory program made up of college students who has actual experience working for employer, rebutted such case by articulating a legitimate, nondiscriminatory reason for hiring four males who accepted employer's offer; furthermore, with regard to lower level chemist's job, employer rebutted prima facie case by showing that its decision was based on superior qualifications of the person selected.

Affirmed.

1. Civil Rights Key 38

Compliance with administrative review apparatus provided by Title VII is a requisite for judicial review of the discrimination claim. Civil Rights Act of 1964, §701 et seq., 42 U.S.C.A. §2000e et seq.

2. Civil Rights Key 43

Trial Court, in reviewing Title VII

claims, properly declined to consider charges of discrimination occurring subsequent to filing of administrative complaint as other than corroborative evidence. Civil Rights Act of 1964, §701 et seq., 42 U.S. C.A. §2000e et seq.

3. Civil Rights Key 32(1)

Allegations of discrimination occurring subsequent to filing of administrative complaint will be entertained by court provided that the judicial complaint and proof are "reasonably related" to charges in the administrative filing and "no material differences" between them exists; judicial claims which serve to amplify, clarify or more clearly focus earlier EEO complaints are appropriate while allegations of new acts of discrimination, offered as essential basis for requested judicial review, are not appropriate. Civil Rights Act of 1964, §701 et seq., 42 U.S.C.A. §2000e et seq.

4. Civil Rights Key 44(1)

To establish a prima facie case of disparate treatment in an employment discrimination case, a plaintiff must prove: (1) that she belongs to a group protected by Title VII; (2) that she sought and was qualified for a job for which employer was accepting applicants; (3) that despite her qualifications she was rejected; and (4) after her rejection position remained open and employer continued to seek applicants among persons having plaintiff's qualifications. Civil Rights Act of 1964, §701 et seq., 42 U.S.C.A. §2000e et seq.

5. Civil Rights Key 43, 44(1)

Once a plaintiff in a Title VII case establishes a prima facie case, defendant is entitled to refute it by proving nondiscriminatory reason for the hiring decision by a preponderance of evidence; however, plaintiffs are given a fair opportunity to show that explanation supplied

by employer is in fact a pretext for discrimination. Civil Rights Act of 1964, §701 et seq., 42 U.S.C.A. §2000e et seq.

6. Civil Rights Key 9.14

Even assuming that plaintiff, who had been out of school since 1965 and out of work force for over six and one-half years, met initial burden of establishing prima facie case of employment discrimination in refusal to hire her for chemist position, employer, which gave preference to participants in nondiscriminatory program made up of college students who had actual experience working for employer, rebutted such case by articulating a legitimate, nondiscriminatory reason for hiring four males who accepted employer's offer; furthermore, with regard to lower level chemist's job, employer rebutted prima facie case by showing that its decision was based on superior qualifications of the person selected. Civil Rights Act of 1964, §701 et seq.,

42 U.S.C.A. §2000e et seq.

Appeal from the United States District Court for the Northern District of Alabama.

Before RUBIN and POLITZ, Circuit Judges, and POINTER,* District Judge.

POKITZ, Circuit Judge:

Dorothy Jean Ray appeals adverse rulings on a motion for partial summary judgment, and on the merits after a bench trial, of her Title VII claims, 42 U.S.C. §2000e, et seq. We affirm.

Ray received a Bachelor of Science degree in chemistry from Georgia Institute of Technology in 1965. During college she worked summers and part time as a chemistry undergraduate research assistant. Following her graduation, Ray worked as a chemist for approximately one year; she left that position in January 1967 due to a move occas-

*District Judge of the Northern District of Alabama, sitting by designation.

ioned by the hiring of her husband as a Tennessee Valley Authority (TVA) chemist in Muscle Shoals, Alabama.

On June 19, 1973, after having been out of the work force for 6½ years, Ray filed an employment application with the TVA's Muscle Shoals Area Employment Office and requested a professional chemist's position. No second choice was listed on the form. Based on her academic credentials, prior employment and stated preferene, she was classified as an applicant for a "1520 Chemist Jr. Grad" SD-1 or SD-2 level professional position.

Job interviews were granted to applicants on request; job classifications were discussed at that time. Ray did not avail herself of this opportunity, nor did she request any information about the job application or communicate with the employment office until January 10, 1974. On that

date, she notified the office that she would also accept a subprofessional job at the SE-level. Her application was re-classified. She was hired at the SE-level on February 17, 1976 and promoted to the SD-level in August 1977.

Dissatisfied with the TVA's handling of her job application, Ray filed an Equal Employment Opportunity complaint on February 8, 1974, which she revised and refiled on February 20, 1974, alleging that she was the victim of sex discrimination and a target of TVA reprisals because her husband had challenged his dismissal from the TVA. Following a full administrative investigation and hearing, Ray's complaints were dismissed. On review, the Civil Service Commission (CSC) Appeals Review Board affirmed. The instant suit was filed on January 19, 1976.

Ray complains that in the eight months between her initial job application and the

filing of the revised EEO complaint, three white males were hired to SD-level jobs at Muscle Shoals. Moreover, she charges that when she first applied for a job in 1973, no females were employed as professional chemists at the Muscle Shoals facility despite the fact that in 1971-1972 and 1972-1973, 18% of those graduating with Bachelor of Science degrees in chemistry from the accredited colleges and universities were female. To reinforce her sex discrimination charge, Ray points out that a male was hired to an SE-level position between January 10, 1974, the date she amended her application to request such employment, and February 20, 1974, the date of her revised EEO complaint. Her position claims that discriminatory hiring practices continued until she was hired, and that the TVA's failure to hire her was a part of its retaliation for her husband's formal resistance to his termination.

In granting the defendant-appellees'[1] motion for partial summary judgment, the district court rejected that portion of the complaint predicated on the retaliation charge. In addition, all charges of sex discrimination allegedly occurring after February 20, 1974, were dismissed.

At the bench trial de novo, the district judge modified his earlier ruling and permitted introduction of evidence tending to show discrimination in the form of the alleged reprisal, between July 24, 1973, and February 20, 1974. The trial focused on acts of sex discrimination alleged to have occurred prior to February 20, 1974. Both the sex discrimination and retaliation charges made by petitioner were rejected.[2]

1. As reflected by the style of these proceedings, the complaint named a number of TVA employees as defendants. The action as against them was dismissed on motion and there is no appeal from that judgment.

In addressing the Title VII sex discrimination charge, the court found that three persons were hired at the SD-level after Ray applied for a job. All had participated in a student cooperative program involving the TVA and Florence State University (now University of North Alabama). Under this co-op program, students alternately attended the university and worked at the Muscle Shoals facility. In addition to regular class studies, the co-op students received extensive on-the-job training by TVA chemists, became familiar with TVA operations, and had their performance evaluated by TVA supervisors. Nearly 50% of the co-op students were female. During the period in question, one of the female co-op participants was offered employment which she declined in order to pursue graduate studies at Vanderbilt University.

2. Ray does not urge the retaliation charge on appeal.

Jobs were offered to co-op students under the TVA's "Open Register" plan which established a hierarchy of hiring preference. Applicants were classified and considered for employment in the following order:

1. cooperative program graduates/recent college graduates;
2. straight-line promotions;
3. employee bidding;
4. other candidates not recruited directly from college.

Under this plan, participants in the cooperative student program were given the highest priority. The district court found this preference to be reasonably grounded. These applicants were recent college graduates, exposed, at least in theory, to the most recent developments in the field of chemistry. Furthermore, they had actual experience working for the TVA and their

and their performances had been evaluated by TVA supervisors. The co-op students hired, as well as the female who declined employment to pursue further studies, all were accorded priority over Ray, who fell into the least preferred category. The district court found that hiring the three males from the co-op program for the SD-level slots was not discriminatory.

The district court examined Ray's charge that a male was improperly awarded an SE-level position in the Ammonia Branch after she indicated that she would accept an SE-level job. Finding that the male employed had previously worked for TVA, was experienced and capable of performing all tasks of the particular job without training, that there was a need for someone who could immediately perform all duties and that he had a veteran's preference, the court held that the hiring was not disc-

riminat ry.

On appeal, Ray challenges the district court's refusal to entertain complaints of discrimination occurring after February 20, 1974, and its conclusion that the hiring practices followed were non-discriminatory.

Post EEO Complaint Claims

(1,2) The district court concluded that it could not entertain complaints which had not been previously considered within the administrative review process. We agree. Compliance with the administrative review apparatus provided by Title VII is a requisite for judicial review of a discrimination claim. Brown v. GSA, 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976); Hoffman v. Boeing, 596 F.2d 683 (5th Cir. 1979). The district court could properly consider all claims which had been the subject of the CSC hearing. However, Ray also alleged discrete acts of discrimination occ-

urring subsequent to the filing of her February 20, 1974, revised administrative complaint. The district court appropriately declined to consider these charges as other than corroborative evidence.[3]

By alleging post-February 1974 acts of discrimination for the first time in her complaint to the district court, Ray would circumvent the entire administrative enforcement mechanism. It would be particularly inappropriate to allow such a bypass of the administrative process in suits involving federal agencies. To permit Ray to seek judicial relief without first affording the federal-agency employer an opportunity to remedy discriminatory practices would undermine "the crucial administrative

3. The district court properly allowed evidence offered to show post-February 1974 discriminatory acts, introduced to support or corroborate charges of pre-1974 discrimination. The court was not impressed or persuaded by such evidence.

role that each agency together with the Civil Service Commission was given by Congress in the eradication of employment discrimination." Brown v. GSA, 425 U.S. at 833, 96 S.Ct. at 1968. We hold that Ray may not secure judicial review of these claims without prior administrative consideration. Discrete acts of discrimination which occur after the filing of an EEO complaint must first be reviewed administratively before such acts may serve as the basis for a finding of discriminatory conduct justifying remedial action by the court. Ray had previously amended and revised her EEO complaint. She could have filed another administrative complaint attacking post-February 1974 employment decisions; she did not do so despite admonitions to her during the administrative process that such matters could not be considered under her then pending

complaint.

(3) The foregoing is not to be taken as a requirement that allegations in judicial complaints must be the mirror image of earlier EEO filings. Nor do we suggest the barring of evidence that demonstrates post-EEO complaint discrimination. Subsequent acts may indeed be the proper subject of pleading and proof. As long as allegations in the judicial complaint and proof are "reasonably related" to charges in the administrative filing and "no material differences" between them exist, the court will entertain them. Danner v. Phillips Petroleum Co., 447 F.2d 159 (5th Cir. 1971); Sanchez v. Standard Brands, Inc. 431 F.2d 455 (5th Cir. 1970). As we have noted in Sanchez at 466:

> . . . the "scope" of the judicial complaint is limited to the "scope" of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.

Judicial claims which serve to amplify, clarify, or more clearly focus earlier EEO complaints are appropriate. Allegations of new acts of discrimination, offered as the essential basis for the requested judicial review, are not appropriate. See Danner, 447 F.2d at 163 n. 3.

Ray's post-February 20, 1974 judicial complaints were properly dismissed by the trial court because they would have required the court to initially adjudicate new claims of discrimination. Entertaining this facet of Ray's lawsuit would have served to thwart the "rigorous administrative exhaustion requirements" mandated by Title VII. Brown, 425 U.S. at 833, 96 S.Ct. at 1968.

Sex Discrimination Claims

(4) Ray's assertion that she has been the victim of sex discrimination is based entirely on the TVA's hiring of four

males. On August 6, 1973, three male co-op participants were hired to fill SD-level jobs at Muscle Shoals. An SE-level job was filed by a male on February 5, 1974. Ray contends that employment of these men subjected her to "disparate treatment" which is expressly prohibited.[4] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); Furnco Construction Corp. v. Waters, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978). Under McDonnell Douglas, to establish a prima facie case of disparate treatment, Ray must prove: (1) that she belongs to a group

4. Ray apparently also contends that the "Open Register" hiring plan constitutes a facially neutral hiring policy which is prohibited because it operates to impermissibly exclude women, i.e., a claim of disparate impact. Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed. 2d 158 (1971). We do not agree. Approximately 50% of the co-op participants were female. By Ray's own reckoning 18% of all current graduate chemists are female. The plan has not been shown to have a disparate impact on women.

protected by Title VII, (2) that she sought and was qualified for a job for which the employer was accepting applicants, (3) that despite her qualifications she was rejected, and (4) that after her rejection the position remained open and the employer continued to seek applicants among persons having plaintiff's qualifications.

(5) Once the plaintiff establishes a prima facie case, the defendant is entitled to refute it by articulating a legitimate, non-discriminatory reason for the hiring decision. Jefferies v. Harris Cty. Community Action Ass'n., 615 F.2d 1025 (5th Cir. 1979); Turner v. Texas Instruments, 555 F.2d 1251 (5th Cir. 1977).

Adequate rebuttal of the plaintiff's prima facie case does not automatically foreclose a finding of defendant's liability; plaintiffs are given a fair opportunity to show that the explanation supplied by

the employer is in fact a pretext for discrimination. McDonnell Douglas, 411 U.S. at 792, 93 S.Ct. at 1817; Jefferies, 615 F.2d at 1030.

(6) It would appear that Ray met her initial burden of establishing a prima facie case. She is protected by Title VII, applied for an SD or SE-level chemist's job for which she was qualified,[5] was rejected and while her application was on

5. The district court noted that, "it is possible to conclude that these positions would not have even been established but for the fact that (the) TVA felt some obligation to offer such a position to students who successfully completed the student Co-op program and sought permanent employment. And, except for those three positions, no other professional position for which plaintiff was qualified became available during the entire period (from) June 19, 1973 to February 20, 1974." The second element of the prima facie case requires that the complainant apply and be qualified for a job for which the employer was seeking applicants. In view of this requirement one may question whether Ray carried her initial burden.

file, males were hired to fill the SD and SE-level jobs. However, the defendants shouldered their burden and rebutted Ray's prima facie case. The evidence shows that all males hired for SD-level jobs had participated in the co-op program. The co-op program is not discriminatory in theory or practice. Any qualified student, regardless of sex, may participate in that program. Had she not decided to pursue graduate studies, one female participant would have been hired as an SD-level employee. Giving a preference to participants in the co-op program is not discriminatory. As we have noted above, valid reasons supported the hiring preference given co-op students. Their formal education was very current and their practical experience in the form of on-the-job training was obviously invaluable.

By contrast, Ray had been out of the

work force for 6½ years when she applied for an SD-level job. Nothing on her application reflected efforts to remain current on new developments in the field of chemistry. She had not worked at Muscle Shoals and was not familiar with the operation. Additionally, TVA supervisors had no first-hand knowledge of her capabilities.

When the TVA hired the male for an SE-level chemist's job in the Ammonia Branch, they needed an employee who could immediately fill the position. The male hired met their needs for he had previously performed that job and his capabilities were well known. Assuming that Ray established a prima facie case, the TVA more than adequately rebutted it by proving that its decision was based on the superior qualifications of the person selected.

Finally, the record reflects no credible evidence that the reasons articulated by the TVA for its hiring decisions

were merely protexts to cover sex discrimination.

The matter stands AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-3746

FILED
OCT 22 1980
GILBERT F. GANUCHEAU CLERK

DOROTHY JEAN RAY,
Plaintiff-Appellant

versus

S DAVID FREEMAN, AUBREY J. WAGNER AND WILLIAM L. JENKINS,

Defendants-Appellees.

- - - - -

Appeal from the United States District Court for the Northern District of Alabama

- - - - -

ON PETITION FOR REHEARING
(OCTOBER 22, 1980)

Before RUBIN and POLITZ, Circuit Judges and POINTER, District Judge*.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT: Henry A. Politz, United States Circuit Judge

*District Judge of the Northern District

of Alabama, sitting by designation.

5 U.S.C. §3313

The names of applicants who have qualified in examinations for the competitive service shall be entered on appropriate registers or lists of eligibles in the following order-

(1) for scientific and professional positions in GS-9 or higher, in the order of their ratings, including points added under section 3309 of this title; and

(2) for all other positions-

(A) disabled veterans who have compensable service connected disability of 10 percent or more, in order of their ratings, including points added under section 3309 of this title; and

(B) remaining applicants, in the order of their ratings, including

points added under section 3309 of this title

The names of preference eligibles shall be entered ahead of others having the same rating.

TVA CODE, Office of the General Manager, III SELECTION ... an outside candidate, rather than an employee, may be selected on the basis of relative merit and efficiency.

TVA PERSONNEL MANUAL INSTRUCTION, Division of Personnel, APPOINTMENTS, Salary Policy PM Section 7, ... The selecting person, after reviewing the records of those certified, may do one of the following:

(1) Select a present employee; or

(2) Select a certified reemployment list candidate; or

(3) Select a candidate not certified from a reemployment list (where there are fewer than three persons

certified from such list), if such candidate is judged better qualified than certified reemployment list candidates. (if such candidate is selected in preference to a certified reemployment list candidate, the division notifies the union having jurisdiction, if any.)

TVA PERSONNEL MANUAL, PROMOTION AND TRANSFER, Salary Policy PM Sect. 7 ... In its discretion, or if requested by the selecting organization, the Employment Branch will also certify nonemployee candidates. (for "Unanounced Vacancies")

* * *

If an office or division wishes to consider outside applicants, it requests the Employment branch to supply them, as provided under APPOUNTMENTS, Salary Policy, PM 7.

PERSONNEL MANUAL INSTRUCTION (TVA) Cooperative Student Program

The cooperative student program integrates alternating periods of academic study and related TVA employment for college students under divisional training plans. Students in the program are generally enrolled in a college or university offering a cooperative curriculum and are recommended by the school. Where possible, students are paired to fill one TVA position, one student working with TVA while the other attends college.

* * *

11. Placement upon Completion of Program. Prior to graduation of the students, the employment office or division tries to arrange for their placement upon graduation. If placement of the students in TVA positions cannot be made by the employing office or division, the Employment Branch is notified. If students are subsequently terminated because placement is not made, the termination forms must reflect their

satisfactorily completing the cooperative program.

Civil Service Commission Revision in Equal Opportunity Regulations (Part 713) of the Federal Personnel Manual System dated Nov. 3, 1972:

Freedom from Reprisal or Interferences

Sec. 713.262(c) When a complainant, after completion of the investigation of his complaint under section 713.216, requests a hearing and in connection with that complaint alleges restraint, interference, coercion, discrimination, or reprisal, the complaints examiner assigned to hold the hearing shall consider the allegations as an issue in the complaint at hand or refer the matter to the agency for further processing under the procedure chosen by the complainant pursuant to paragraph (a) of this section.

TENNESSEE VALLEY AUTHORITY EQUAL EMPLOYMENT OPPORTUNITY ANNUAL REPORT, 1973

II Recruitment Activities Designed to Reach and Attract Job Candidates from All Sources

A. Ensure that recruitment sources which are best able to provide women and minority candidates for each position vacancy are selected and used to the extent possible. ...

B. Inform office and division heads of various recruitment sources, particularly for women and minority candidates; and in cooperation with offices and divisions, initiate special recruiting efforts to locate women and minority candidates for those occupations in which they have few representatives in proportion to total employment and where such candidates are not available within TVA.

Action Taken:

1. Division representatives have been informed of sources and candidates and about techniques to improve recruiting. They have been urged to move quickly on employment of minority and women candidates, particularly those in technical fields where competition from other employers is keen.

42 U.S.C. §2000e-16

(a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies (other than the General Accounting Office) as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of

the Government of th District of Columbia having positions in tho competitive service, and in those units of tho legislative and judicial branches of the Federal Governm-ent having positions in tho competitivo service, and in tho Library of Congress shall be made free from any discrimination based on race color, religion, sex, or national origin.

(b) Except as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section. ...

42 U.S.C. §2000e-2(a) It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with res-

pect to his compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

42 U.S.C. §2000e-3(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discrimin-

ate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

No. 80-1220

In the Supreme Court of the United States

OCTOBER TERM, 1980

DOROTHY JEAN RAY, PETITIONER

v.

S. DAVID FREEMAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below correctly concluded that the Tennessee Valley Authority's decision not to hire petitioner was not gender discriminatory or otherwise in violation of 42 U.S.C. 2000e-16.

2. Whether petitioner's failure to raise events after February 20, 1974, as the basis for her discrimination claim constituted a deliberate bypass of the exclusive administrative remedies provided by 42 U.S.C. 2000e-16.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. A-29 to A-52) is reported at 626 F. 2d 439. The decisions of the district court (Pet. App. A-20 to A-28) and the United States Civil Service Commission Appeals Review Board (Pet. App. A-1 to A-18) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 1980 (Pet. App. A-29). A petition for rehearing was denied on October 22, 1980. The petition for a writ of certiorari was filed on January 21, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner received a B.S. degree in chemistry in 1965, but ceased working in 1967. In June 1973, petitioner applied for a chemist's job with the Muscle Shoals, Alabama, offices of the Tennessee Valley Authority ("TVA"). Because of her minimal work experience, petitioner was eligible only for a limited number of chemist's positions. At the time of her application, petitioner did not indicate on the application form her willingness to accept a subprofessional job and did not meet with TVA personnel officials, although she was entitled to do so. Subsequently, in January 1974, petitioner contacted a TVA official and expressed her unhappiness with TVA's failure to hire her. The personnel officer explained that petitioner was not qualified for the advanced chemist positions and petitioner then stated that she would be willing to accept a subprofessional position. In February 1976, petitioner was hired as a subprofessional, and in August 1977, she was promoted to a chemist's position (Pet. App. A-1 to A-3, A-8 to A-10, A-24 to A-26, A-34 to A-36).

However, in February 1974, prior to her hiring, petitioner filed a complaint with the agency, alleging that TVA's failure to hire her was the result of gender discrimination and a reprisal for her involvement in her husband's claim of religious discrimination against TVA.[1] In particular, petitioner claimed that three male chemists had been hired by the Muscle Shoals facility between June 1973 and February 1974, and that there were no female chemists at that facility. Petitioner's administrative complaint related only to the period prior to February 20, 1974, and was not amended after that date. Following TVA's investigation and denial of petitioner's claims (see 29 C.F.R. Part 1613), she requested an evidentiary hearing before a Civil Service Commission Complaint Examiner (Pet. App. A-1 to A-3, A-8 to A-10, A-24 to A-26, A-34 to A-36).

The hearing officer determined that TVA's refusal to hire petitioner as a chemist was neither discriminatory nor an act of reprisal. Specifically, the evidence showed that the three hirees were recent chemistry school graduates with extensive work experience at the TVA Muscle Shoals facility through a nondiscriminatory TVA work-study program. This cooperative study program involved 50% female participation and one of the female participants had in fact been offered a job at Muscle Shoals.[2] In addition, during the relevant time period, TVA reinstated a former agency chemist who was eligible for veteran's preference

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[1]Petitioner's husband had been laid off by TVA in March 1973 as part of a reduction in work force. His claim of religious discrimination has been found to be without merit. See *Ray* v. *TVA*, No. 74-6-601 NW (N.D. Ala. Nov. 12, 1974, and Jan. 9, 1975), appeal dismissed, 521 F. 2d 812 (5th Cir. 1975), cert. denied, 424 U.S. 973 (1976).

[2]She declined in favor of graduate study (Pet. App. A-13). The evidence further indicated that TVA would not have made these offers except to ensure the long term viability of its student cooperative program (*id.* at A-26, A-49 n.5).

and hired a female chemist at an advanced level. All of these chemists had substantially greater work experience than petitioner, who had last worked or studied chemistry in 1967 (Pet. App. A-3 to A-5, A-12 to A-17, A-25 to A-28). Accordingly, the hearing examiner found no evidence of discrimination and recommended the dismissal of petitioner's complaint, and TVA concurred in these findings and recommendations.

On review, the Civil Service Commission Appeals Review Board affirmed, finding that petitioner's "nonselection [did not] result[] from discrimination because of her sex or reprisal for her husband having previously filed a discriminatory complaint against the agency" (Pet. App. A-17). The Board also declined to consider petitioner's claims regarding post February 20, 1974, events since petitioner's administrative complaint solely concerned events prior to that date (*id.* at A-10 to A-11). The Board noted that its decision did not preclude petitioner from filing a separate complaint regarding TVA's actions regarding petitioner after February 20, 1974.

2. Petitioner then filed this suit in the United States District Court for the Northern District of Alabama, claiming that TVA's failure to hire her in June 1973 violated Section 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16. The district court granted partial summary judgment for defendants with regard to all claims involving acts after February 20, 1974—the date of petitioner's amended administrative complaint. Following a trial, the district court made a de novo determination that petitioner was not discriminated against on the basis of gender or because she had aided her husband in his prosecution of a discrimination claim against TVA. The court upheld TVA's nondiscriminatory hiring preference for recent graduates who had worked at TVA through the cooperative program. The court also found that TVA's

reinstatement of a veteran's preference, male employee, who had recent TVA experience and required no training for the job in question, was not discriminatory (Pet. App. A-25 to A-28, A-38 to A-41).

3. On appeal, the court of appeals affirmed (Pet. App. A-42 to A-52). The court first held that the district court properly declined to consider petitioner's complaints regarding events after February 20, 1974, except as evidence corroborating petitioner's other claims. Relying on *Brown* v. *GSA*, 425 U.S. 820 (1976), the court of appeals explained that "the administrative review apparatus provided by Title VII is a requisite for judicial review of a discrimination claim" (Pet. App. A-42). Otherwise, the court of appeals observed (*id.* at A-43 to A-44), claimants would raise charges for the first time in the district court thereby bypassing and undermining the comprehensive administrative procedures mandated by Congress. Accordingly, the court of appeals upheld the dismissal of petitioner's post February 20, 1974, claims, which petitioner had purposely failed to submit to the agency despite admonitions to do so (*id.* at A-43 to A-46).

The court of appeals also rejected petitioner's pre-February 1974 discrimination claims.[3] The court noted that it was questionable whether petitioner had even established a prima facie case of discrimination (Pet. App. A-49 n.5), but that in any event TVA's evidence amply rebutted that claim. The court observed that the three men hired in professional positions for which petitioner was arguably qualified (as well as a female chemist who was offered a job but did not accept) were all participants in a nondiscriminatory, student-work cooperative program at TVA. Each of these employees had recent chemical training and

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[3]Petitioner did not pursue her reprisal claim on appeal (Pet. App. A-39 n.2).

significant work experience at TVA. In contrast, petitioner had not worked at all for 6-1/2 years prior to her application to TVA. Similarly, the court of appeals found that TVA had properly rehired a former male, veteran's preference employee who was thoroughly familiar with the position and whose capabilities were well known to the agency (Pet. App. A-49 to A-52).

ARGUMENT

1. Petitioner primarily contends (Pet. 17-22) that the district court incorrectly dismissed her discrimination complaint pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16(c). But, consistent with the findings of the agency itself, the administrative law judge, and the Civil Service Commission (Pet. App. A-4 to A-5, A-12 to A-17), both courts below correctly found that TVA did not discriminate against petitioner on the basis of gender (*id.* at A-24 to A-28, A-46 to A-52). Further review of these concurrent factual findings is unwarranted. See, *e.g.*, *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

In any event, petitioner's claims are unfounded. Three of the males hired instead of petitioner were recent chemistry graduates and had extensive experience at TVA through a student cooperative program. Fifty percent of the participants in this program were female, and TVA had offered a job to a female graduate during the relevant time period. Petitioner, in contrast, had no experience at TVA, and had not worked at all in the fast developing field of chemistry for six and a half years. Similarly, both the other male and female chemists hired by TVA at this time had substantial recent work experience. Indeed, TVA had previously employed the male chemist, who was entitled to a bona fide veteran's preference, at the same job for which he was hired.

In short, TVA's employment decisions were "based on the superior qualifications of the person selected" and not the applicant's gender (Pet. App. A-51).

2. Petitioner also contends (Pet. 22-24) that the courts below erred in failing to consider evidence of TVA's discrimination after February 20, 1974. At the outset, we note that the district court did consider these allegations insofar as they tended to corroborate petitioner's pre-February 20 claims, but it found petitioner's evidence unpersuasive (Pet. App. A-43 & n.3). Furthermore, Title VII requires a claimant against the government to exhaust the comprehensive administrative remedies provided by the Act and regulations before seeking judicial review. *Brown* v. *GSA*, 425 U.S. 820, 831-833 (1976); *James* v. *Rumsfeld*, 580 F. 2d 224, 226-227 (6th Cir. 1978); 42 U.S.C. 2000e-16(c) and (d); 29 C.F.R. 1613.281. Here, notwithstanding the explicit admonitions of the administrative law judge and the Civil Service Commission (Pet. App. A-10 to A-11), petitioner failed to file an administrative complaint with regard to separate events of alleged discrimination occurring after February 20, 1974. In light of her intentional bypass of the jurisdictional administrative remedies, petitioner may not now be heard to complain. See, *e.g.*, *Delaware State College* v. *Ricks*, No. 79-939 (Dec. 15, 1980), slip op. 6; *Brown* v. *GSA*, *supra*; *James* v. *Rumsfeld*, *supra*, 580 F. 2d at 227-228; *Bracamontes* v. *Amstar Corp.*, 576 F. 2d 61, 62 (5th Cir. 1978); *Scott* v. *Perry*, 569 F. 2d 1064, 1065-1066 (9th Cir. 1978); *Molybdenum Corp.* v. *EEOC*, 457 F. 2d 935, 936 (10th Cir. 1972); *Danner* v. *Phillips Petroleum Co.*, 447 F. 2d 159, 162 n.3 (5th Cir. 1971).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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